

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

DARIUS RICE

PLAINTIFF

VS.

CIVIL ACTION NO. 3:22CV397TSL-RPM

HAMILTONDAVIS MENTAL HEALTH, INC.
AND MARIE HAMILTON-ABSTON

DEFENDANTS

ORDER

Plaintiff Darius Rice has moved pursuant to Federal Rule of Civil Procedure 4(d)(2) for an award of costs of service of process and for attorney's fees for preparing and filing the present motion on account of the alleged refusal of defendants HamiltonDavis Mental Health, Inc. and Marie Hamilton-Abston to waive service of process. Defendants have responded in opposition to the motion, and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes the motion is well-taken and should be granted to the extent set forth herein.

Plaintiff seeks to recover \$1,134.20 in costs and attorney's fees related to serving defendants with process following their failure to return the requests to waive service of summons. This includes \$985.80 [3.1 hrs at \$318/hr] in attorney's fees for service of process and for preparing and filing the present motion; \$38.40 for postage/printing of request for waiver; \$50 for service of process on HamiltonDavis;

and \$60 for service of process on Hamilton-Abston. Rule 4(d) provides that "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons," and if the defendant "fails, without good cause, to sign and return a waiver requested by a plaintiff ..., the court must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses." Fed. R. Civ. P. 4(d)(2). Plaintiff bears "the burden to show entitlement to costs and fees under" the rule. Flores v. Sch. Bd. of DeSoto Par., 116 F. App'x 504, 508 (5th Cir. 2004)

Here, defendants do not purport to allege or demonstrate good cause for their failure to sign and return the waivers. Rather, they first maintain that the motion is due to be denied because plaintiff "has failed to provide information on when or where these waivers were sent, what documents were included in the mailing, and whether [d]efendants actually received the requests" and thus, has not satisfied his burden to show entitlement to recovery. The record in this case belies this assertion. The court record shows that on August 11, 2022,

plaintiff's attorney docketed a "NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS" as to each defendant and certified that he had sent the waivers on the same day. The form advised defendants that the signed waivers should be returned within 30 days and further advised of the consequences of failing to return the form, including that they could be required to pay the expenses for making service. That alone would be sufficient to satisfy plaintiff's burden. In addition, however, defendants' discovery responses submitted in connection with their motion to set aside a default judgment previously entered against them also shows that defendants received the waivers. For example, in responses to an interrogatory specifically asking why they failed to return the waivers of service, defendants did not deny having received the waivers but rather implicitly acknowledged receipt, stating that "when the request for waiver of service was sent on August 11, 2022," they immediately began efforts to retain counsel to represent them and in fact first contacted their current counsel about defending them weeks before they were formally served with process.

Defendants further object that even if plaintiff is entitled to recover expenses of service under Rule 4(d), he is not entitled to recover the attorney's fees incurred in connection with serving the complaint but instead may only

recover expenses associated with preparing and filing the motion for costs. Indeed, “[u]nlike Rule 4(d)(2)(b), which provides for the recovery of ‘reasonable expenses, *including attorney’s fees,*’ [of any motion required to collect service-related expenses], Rule 4(d)(2)(A) provides only for the recovery of expenses [incurred in making service].” Rick’s Cabaret Int’l, Inc. v. Indem. Ins. Corp., No. 11-CV-3716, 2012 WL 208606, at *5 (S.D. Tex. Jan. 24, 2012) (emphasis added) (brackets added). See also Hatch v. Jones, No. 4:18-CV-4146, 2019 WL 6137389, at *7 (S.D. Tex. Oct. 30, 2019), report and recommendation adopted, No. 4:18-CV-04146, 2019 WL 6135119 (S.D. Tex. Nov. 15, 2019) (recognizing that plaintiffs are entitled to recover expenses but not legal fees incurred in making service).

Defendants last argue that because plaintiff failed to make a demand for payment of service expenses before filing the present motion, his request for attorney’s fees incurred in connection with the present motion should be denied. In the one case cited by defendants -- Clean Pro Carpet & Upholstery, Inc. v. Upper Pontalba of Old Metairie Condo. Ass’n, Inc., No. CV 20-1550, 2022 WL 1288721, at *5 (E.D. La. Apr. 29, 2022) -- the court did opine that Rule 4(d)(2) “seem[s] to contemplate” requiring the plaintiff to make a demand for fees prior to filing a motion,” id. at 5. The undersigned, however, is not persuaded that the rule, which does not explicitly require a

demand as a prerequisite to recovery of fees, implicitly imposes such a requirement. .

Based on the foregoing, it is ordered that plaintiff's motion is granted to the extent that defendants shall pay \$625.40, which amount includes \$477 in legal fees for preparation and filing of the present motion and \$148.40 for expenses of service.

SO ORDERED this 10th day of August, 2023.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE